Jay

STATE OF INDIANA)
) SS:
COUNTY OF MARION)

IN THE SUPERIOR COURT OF MARION COUNTY

YVONNE ROGERS, Individually)
and as Executrix of the Estate)
of Richard Rogers, Deceased,)
)
Plaintiffs,)
)
-vs-) CAUSE NO.
) 49D02-9301-CT-0008
R. J. REYNOLDS TOBACCO CO.,)
et al.,)
)
Defendants.)

REPORTER'S TRANSCRIPT OF PROCEEDINGS

BEFORE: HON. KENNETH H. JOHNSON, JUDGE

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VOLUME I
February 3, 1995
Morning Session

JOHN E. CONNOR & ASSOCIATES, INC.
1860 ONE AMERICAN SQUARE
INDIANAPOLIS, IN 46282
(317) 236-6022

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APPEARANCES

FOR THE PLAINTIFF(s): Mr. C. Warren Holland
Mr. Michael W. Holland
HOLLAND & HOLLAND
251 East Ohio Street
Suite 1111
Indianapolis, IN 46204
-and-
Mr. Morris L. Klapper
Ms. Laurel R. Klapper
KLAPPER, ISAAC & PARISH
2421 Willowbrook Parkway
Suite 201
Indianapolis, IN 46205-1541

FOR THE DEFENDANT(s): Mr. J. C. McElveen, Jr.
R. J. Reynolds Tobacco Co.
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005-2088
-and-
Mr. William T. Plesec
JONES, DAY, REAVIS & POGUE
North Point
901 Lakeside Avenue
Cleveland, OH 44114
-and-
Mr. Richard D. Wagner
Mr. James G. McIntire
KRIEG, DEVAULT, ALEXANDER & CAPEHART
One Indiana Square, Suite 2800
Indianapolis, IN 46204-2017

FOR THE DEFENDANT(s): Mr. Bruce G. Sheffler
American Tobacco
CHADBOURNE & PARKE
30 Rockefeller Plaza
New York, NY 10112
-and-
Mr. Terrill D. Albright
BAKER & DANIELS
300 North Meridian Street
Suite 2700
Indianapolis, IN 46204

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APPEARANCES

FOR THE DEFENDANT(s): Mr. David K. Hardy
Philip Morris, Inc. Mr. William S. Ohlemeyer
SHOOK HARDY & BACON
One Kansas City Place
1200 Main Street
Kansas City, MO 64105
-and-
Mr. David O. Tittle
BINGHAM SUMMERS WELSH & SPILMAN
2700 Market Tower
10 West Market Street
Indianapolis, IN 46204-2982

FOR THE DEFENDANT(s): Mr. James V. Kearney
Liggett Group, Inc. MUDGE ROSE GUTHRIE ALEXANDER & FERDON
180 Maiden Lane
New York, NY 10038
-and-
Mr. James W. Riley, Jr.
RILEY BENNETT & EGLOFF
One American Square
Suite 1810
Indianapolis, IN 46204

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(WITNESS - STEPHEN JAY, M.D.)

INDEX OF EXAMINATION

DIRECT EXAMINATION. 882
Questions By Mr. C. Warren Holland

INDEX OF EXHIBITS

PAGE

7 Curriculum Vitae of Dr. Jay.....958

8 - Rendering of X-ray.....934

9 - Representation of X-ray.....936

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(The trial proceedings reconvened on Friday, February 3, 1995, at 8:55 a.m., the Honorable Kenneth H. Johnson presiding.)

(Out of the presence of the Jury)

THE COURT: In my chambers is Chris Phillips and his father have come and I've just spoken to them generally about the procedure of the law requires us, if there's a problem, to have a juror come in and talk to us about the problem and have been talking just kind of generally to put them at ease.

But I have a note here from Shelly that says that you want to talk about it first. Obviously what's going to happen is his dad -- from the note, he called yesterday, I'm guessing, and I think probably fairly accurately, that his dad is going to say that originally the administration of Brebeuf High School had thought Chris's involvement was a positive thing, but upon -- and these are my words, and this is I think an educated guess, but understand it is a guess and I won't know until his dad talks to us, that upon

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reconsideration, the people at Brebeuf have decided that his continued -- he has a very high GPA, I understand he has a 3.84 was it, Steve, 3.8. He has a 3.8 GPA. I could have had a 3.8 if it had been a system out of 10 maybe.

I understand that Chris has premed aspirations, and that Brebeuf, as you know, for those of you who don't know, Brebeuf is an excellent preparatory school and has a long line of history of turning out some excellent students and excellent college people, so a 3.8 at Brebeuf is really saying something. I'm anticipating his dad is going to say that the administration has reconsidered his position, the importance of his high grade point average, and are a bit concerned as a semester senior of the impact of the trial.

They knew that Chris's involvement -- as a matter of fact, I looked at the record last night, because I know Mr. Wagner was concerned and the questions were raised, and I pulled up February 1st, approximately sometime in the

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afternoon of February 1st, we covered -- the question was asked of Chris, and I quote, "Have you had occasion to chat with your parents about your sitting on the jury in a case like this?" I think those were your questions, weren't they? I think it was Mr. Wagner's question.

MR. WAGNER: I don't recall it.

MR. KEARNEY: I think those were mine, Judge.

THE COURT: Was it yours? Okay. He said, "Yes, I told him it was an extended case, but I never really told him what it was about or anything."

I think what he's saying is that he told them about it, but he didn't talk about the case because I just admonished him the night before he wasn't to do that.

But, in any event, you go on then, "But you did tell them it was an extended case" -- this is sort of the problem with a bad question, I guess. See, that's why I was trying to pick on Wagner.

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(Laughter)

THE COURT: I'm teasing. The question says, "But you did tell them it was an extended case and you don't think you're going to have a problem with it," sort of a compound, and the answer was, "No."

When I go look back at it, I'm not sure -- no, I didn't tell them it was an extended case or no, you don't think it's a problem. I think he was responding to the last part of the question. The question was, "But you did tell them it was an extended case and you don't think you're going to have a problem with him," and the answer was "No." I assume he meant no, I don't think I'm going to have a problem with him, I'm not sure what that says about did you tell him it was an extended cased, but, in any event, they're here. It says that you want to talk to me about it. What thoughts do you have?

MR. WAGNER: Your Honor, we had two suggestions, the first of which was that we thought that it might be better to simply meet

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with the juror's father by himself and not in the presence of Chris Phillips, the juror, because we don't really need to talk to Chris, I think we really need to talk to his father, and some things might be said that might be of concern to us if Mr. Phillips stays on the jury.

And this is sort of anticipatory of what might happen if he is excused by the Court. We suggest that at some opportune time, appropriate time when your Honor tells the jury, if this happens, that Mr. Phillips has been excused, that your Honor might say something to the jury about the fact that your Honor is very concerned about what's happened here after he was interrogated and that the jurors had represented they could serve during voir dire, the idea being simply to sort of head off any other defections, if you may, from the jury.

We just thought if your Honor expresses his displeasure about what's happened, it might cut off any further thinking by somebody else

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that they could just get out of this any time they want to.

THE COURT: Sure. I appreciate that. And that is a concern. As I look at the extenuating circumstances of Mr. Lewis, and now Mr. Phillips, the changes have been, one, outside the control, really, of the two people; and, secondly, have been significant changes that have occurred. And Mr. Lewis -- and both of these people, in my opinion, have done everything reasonably necessary. What changed was Brebeuf. What has not changed is Chris's father, is my guesstimation. And, again, I'm still guessing, and I think the suggestion to bring Mr. Phillips out is a good one and he'll tell us whether I'm accurate or not, and it really isn't that important, I suppose, whether I am or not, but I suspect that -- I will say something to the jury of my concern about what happens and our need for them.

But I think it's somewhat unfair, in talking just informally among ourselves, to characterize it as defection. Because I have,

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I suspect, a young man who desperately wants to serve and wants to do this. I think I have a father who is very proud that his son was chosen and wants to do that, but is concerned about his future, and what has changed I think have been circumstances at Brebeuf, when they've looked at it again, have decided that they are not perhaps as cooperative today in working with this student as they were willing to do the other day. Because he had talked to his counselor, he had talked to his parents and everybody said go.

Just like Mr. Lewis called his employer, his employer said we'll pay for it, go. At the last instant, his employer says no, we're going to pay you for three days only and not for six weeks, and now apparently at the last minute Brebeuf had said no, we're concerned and we're not -- Mondays off is not enough for us to make up the lost time, so. The points are well taken, and I think I will address any --

MR. WARREN HOLLAND: Yes, sir. I agree with everything that's been said.

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Obviously we don't want to have somebody in here that it's going to be against his will or whatever.

Just a couple of observations. No. 1 is if the Court would feel it appropriate before making a decision after talking with the father, I don't think it would be inappropriate to impress on him what a spot he's put everybody in, I don't mean the kid, I mean the father. In other words, everybody was selecting jurors on the basis of what we understood was the approval. I don't mean in any angry way or whatever, but I mean just explaining the importance of we inquired about this and we thought it was responded to, I suppose, about a half dozen times by various counsel.

The only other observation I would have is that -- I don't know this, but in many schools the last semester, for instance, doesn't count on your honors.

THE COURT: It does count on your GPA, though.

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MR. WARREN HOLLAND: Probably does.

THE COURT: Oh, it does. I had that little fight with my own son who was 300ths of a point away from the first in his class, but is trying hard to get a 4.0 this semester and overtake the person who's 300th of a point ahead of him because numbers of scholarships, he's already been awarded two, but he wants the Presidential Scholarship and he's got to be No. 1 in his class no matter what the size of the class is, and at least in all the programs, the scholarship programs that I have looked at, and I have reviewed over 380 of them, almost all of them look at an eight-semester class ranking, which is all of your semesters through your four grades.

So, many schools -- some schools have an honors program that only include seven semesters because I guess they want to plan and print programs and it is not enough time between the very end of school, grading papers and then getting class rankings.

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But I've been -- I have fought the fight that, well, salutatorian and valedictorian should be chosen after eight semesters, and a lot of schools don't do that. So honors programs and scholarship programs, it's been my experience, are decidedly different. That's why many scholarship programs have close dates as late as July to allow final class rankings to be posted. It may not affect the honors, but I think it absolutely does affect his ability to gain scholarships and also rankings in classes.

Many universities provide certain amenities to students and they rank them, Harvard is one, a lot of eastern schools will have seats in their freshman classes and the eight-semester GPA is what many of them look at.

Well, then, I assume you agree, also, that the proper procedure is to have dad come in?

MR. WARREN HOLLAND: Oh, yes. And my only point is I don't think the dad should think this isn't a matter of

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significance, that he is affecting a significant trial.

THE COURT: Sure. Uh-huh.

MR. HARDY: Your Honor, as long as we're on the record here, if I might, I would like to make a record on the admonishment issue.

I want to preface this by saying this is not directed at Mrs. Rogers' counsel at all, but I would like to ask the Court to please expand the scope of the admonishment that you're giving the jury to include making it clear to them that they are not to watch any television or read any newspapers or have any contact with any media forum that relates to tobacco at all, because there are a number of things going on and I don't think they're all coincidence, although my first example, I believe, is coincidence.

There's an article that appears in yesterday's edition of the Indianapolis News entitled "Stop Dispensing Death" relating to young smokers, and I believe that that is

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strictly coincidence.

There's an article in the Wall Street Journal this morning about the British government agreeing to -- at least preliminarily to provide some support to legal aid people who want to make claims against the cigarette companies. And I believe that is probably coincidence.

There was an appearance on the Connie Chung show last night by Stanley Rosenblatt, a well-known plaintiff's lawyer from Florida, who has an ETS case pending against the cigarette companies, and I believe that is not coincidence. I think it is part of an organized effort by a number of plaintiffs' groups to put information in the media during trials in an effort to influence the jurors.

Whether I'm right about that or not, the point, I think, is that these jurors could be exposed to this sort of thing, and because it does not relate directly to this lawsuit, they could in all innocence read the article or watch the program.

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And I think that because of some of the tacks that have been taken by the plaintiffs' lawyers in these interviews, this could have an effect on them.

THE COURT: You mean in these interviews with media people?

MR. HARDY: Yes, your Honor. For instance, Stanley Rosenblatt last night was talking about how evil the cigarette companies were and it was very important to get them and so forth. I just don't think it's appropriate for jurors in this or any other case to see that kind of --

THE COURT: Help educate me, an ETS case?

MR. HARDY: Environmental tobacco smoke.

THE COURT: Oh, cigarettes, passive, it was passive.

MR. HARDY: Yes.

THE COURT: Oh, okay. I love acronyms, but it bothers me when I can't figure out what they are. Okay. In light of what

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you've represented, an additional admonishment would seem appropriate.

I subscribe to the Indianapolis News, the morning newspaper, and have a chance to see it. My TV watching is really sporadic. I just don't -- there isn't a whole lot of time to do that. There's a television in my library that doubles as -- is used for video depos and we use that, has a VCR with it, so sometimes when I'm doing orders, things that don't require too deep of concentration, orders to appear and those kinds of things, I'll tune it in. So I don't have personally the means to monitor much of that. So I appreciate from any of you information about what's going on.

Obviously I know something that's going on because the media people are here. I recognize some of them, some of them I don't recognize.

I heard about the Connie Chung, is it Eye to Eye program, and because a number -- obviously I was meeting with the Speaker of the House of Representatives and the majority leader of the House last night and with 28

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judges, and they all know what we're doing and asked me about it. Then I got a call here about, whoa, did you see -- apparently it was a significant piece, the Rosenblatt piece, and I guess he represents, they tell me, is it stewardesses, flight attendants?

MR. HARDY: Yes, flight attendants.

THE COURT: I understand that was part of the program last night, too. So I've got some sporadic sources that will call me that say, you know, did you see this or whatever, but I do appreciate being able to rely upon you to tell me kind of what's going on. Because I think all of us have an interest in justice, notwithstanding that you're advocates and are here to secure a position and to secure a verdict for your client. And so, in any event, I thank you for sort of being my eyes and ears about that, because I'm not, and I'm sure you people are and you have ways and other people who are listening and watching and monitoring. This court simply doesn't have the

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resources or personnel to assign someone to monitor what's going on in the media for cases like this one, so I need to rely on you to tell me that, and I appreciate you doing it. Okay.

MR. WAGNER: Your Honor, do you have time for just one more thing?

THE COURT: Sure.

MR. WAGNER: I'll be as brief about this as I can. I know that I'm sort of on thin ice here because this has to do with the jury notebooks which your Honor suggested, and it is the concern that we have about the manner in which documents may be placed in those notebooks and exactly how that's going to take place and at what time.

First of all, the concern is that if documents that are admitted into evidence are placed into the notebooks during the course of the trial and the jurors have those notebooks and carry them around, they're going to have these exhibits with them really almost the whole time that we're here, which brings up two issues for us. One being that the jurors are

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liable to place undue emphasis on the documentary evidence as opposed to the oral testimony; and, secondly, whether they may be distracted by looking at these exhibits during the course of the trial or maybe some other use of them instead of listening attentively to the oral testimony that's going on.

Our suggestion about that particular issue, which we've talked a little bit about, is that the real -- if the real purpose of the notebooks is to give each juror a notebook that has the exhibits in them, or copies of the exhibits in them that have been admitted during the course of the trial, that that be done at the end of the case and the exhibits put in, so then when they go to the jury room to deliberate their verdict, they will each have a complete set that they can then look at because your Honor will send the exhibits to the jury room anyway, I take it. So that would be really the appropriate time for that to happen.

Otherwise, these two concerns that we've got may take place, and we would just like to

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suggest that to the Court and see what you think about that.

THE COURT: Thank you. I have thought about that. And I appreciate that concern. It's a concern that's expressed at every trail, just about, I've ever tried.

I began as a bailiff and a law clerk in 1968. The Indiana decisions and -- the Indiana Supreme Court decisions on note taking and evidence, part of -- some of the prominent cases happened in the early '60s, so I had a trial judge who was an elder statesman type and I was the one who encouraged him that it seems to me rather strange that the cases that talked about jurors not taking notes were dated in the 1860s. If you take a review of Indiana law, at least it was as a clerk in the late '60s, it was cases that were decided in 1864 during the Civil War that had this sort of Plutonian concept of tabula rasa, that jurors come in with this blank slate and the evidence was, indeed, the utensil upon which was written on their blank slates evidence and that they were

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relegated to their memories.

As you sit and look at trials, I mean, look at you. Look at all this paper that you're surrounded with. I mean, look at me. And we're taking notes furiously. It impressed me as a law clerk that it's interesting that the only important people in the courtroom are sitting in this box and they're not having any of the advantages of capturing evidence and facts as it comes in. It seems to me that we ought to be not writing and they ought to be the ones who are taking the notes.

So there are a number of cases that came to me that expressed that point of view, and I just felt very strongly about it and I was ultimately able to convince my trial judge to do that. Those precedences are Supreme Court precedences that happened in the '60s.

The concept, I think, that jurors would be distracted if they actually had evidence in their hand for me is -- I want to find a word that's nicer than spacious, but I can't -- it doesn't come. I don't mean to be offensive in

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that, but I'm saying it's my job to make sure that my jurors don't fall asleep. It's my job to make sure my jurors come. It's my job to make sure that jurors are attentive during the trial and that they're not distracted by anything. And that's why I wrote the patterned instruction on note taking. I did it with the approval of the court, the Supreme Court, and the eight other judges that were my colleagues on the bench.

So, juror distraction is an important issue, and it is my responsibility as the trial judge in this case to make sure that doesn't happen.

There isn't, it seems to me -- I have never experienced any problem with jurors keeping the exhibits as they come into evidence. To say, well, you know, what will they do? My goodness -- now, when you say they carry them around everywhere they go, they only go two places. They only go in the jury box and they go to the jury room and that's the only place they take them. The men may take

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them to the restroom with them, I don't know, I probably would. But other than basically the jury room and the courtroom, I mean that's essentially the only place they are.

Now, to say that when we have a document that may be 50 pages long or 20 pages long that you're going to give them, I don't know what the total document pages are going to be when we get to the end of the trial, but to say when a document has been offered into evidence, been admitted into evidence, you know, that there's some sort of fear that, well, what if on a break they actually pick this thing up and read it. What happens if during a break or during a lunch hour they actually get their notebooks out and review their notes by themselves privately, they don't discuss it, it seems to me that that enhances the system of justice, it enhances their ability to be informed jurors to make a decision upon what's going on.

So, in any event, I appreciate the concerns, but I think that the appropriate process is to -- unless I see the problem

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otherwise, is that when exhibits are offered into evidence, and at some point during the examination of the witness, if it's a witness that provided the foundation for the document, the document should be given to the jurors. The jurors should be free to examine the discussion -- to examine the documents without discussion.

They are in the possession of their notebooks and those exhibits only in the presence, a lot of the time, mostly in the presence of a staff member. My staff monitors the jury to make sure they don't discuss either the exhibits or discuss the matters of the case.

To lay on these people four to six or seven weeks, whatever it is, of trial, to lay on these people all at one time, here are all these hundreds of pages of exhibits or maybe even thousands, I don't know, and say go deliberate, we're talking about -- you know, you're talking about wanting to offer more than 40 final instructions, they're going to have

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copies of the instructions after they're read as well, so to put in their hands hundreds of pages of documents all at one time, to put in their hands 60, 80, who knows how many instructions, and say go do something in your lifetime is I think not fair.

But I will monitor the jury to be sure that when they're in the courtroom and should be listening to the evidence, that they are attentive, that they don't let their note taking interfere.

Again, I'm the author of that patterned instruction. It was important for me and the committee to make sure that note taking or anything they're doing does not distract from their primary purpose when they're in the courtroom, and that is to listen to the testimony of the witnesses.

In any event, hearing those concerns, we're going to continue on, I believe, in the proper process and the process that helps these people be informed jurors, that let's them when they get back to their time for their

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deliberations to have a reasonable grasp upon the facts that have been introduced in evidence and the instructions as we'll give them to them and to reach a verdict.

It is also impossible for me to always watch all nine people, so I'm assuming if we're running one hot afternoon and I've got a juror that is not attentive, that you'll bring that to my attention. If they're tired or sleepy or whatever, you'll be my eyes and ears, like you'll be my eyes and ears for what's going on in the media and you'll also be for what's going on in the panel. If that's happening, then we need to stop and get them attentive. I will monitor that to be sure, do all I can do to make sure that they are attentive in the courtroom, but it seems to me while they're outside the courtroom, it is totally appropriate, if a document has been admitted into evidence and they haven't had a chance to review it, on break to sit back and review their notes, to sit back and ponder on what they've heard, not discuss it, but certainly

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privately to review their own notes. We're throwing a whole lot at these people, and I think that's appropriate.

Okay. Why don't you ask Mr. Phillips to come in.

(9:23 a.m.)

(Mr. Ryan Phillips enters the courtroom.)

QUESTIONS BY THE COURT:

Q You came in so quietly. Good morning. Thank you for joining us. You and I have had a brief occasion to talk in my chambers, and I've almost sort of made apologies to you for the formidable circumstances of at least the arrangement, being so many of us, and it's not our intent to embarrass or to make you feel awkward in any way. It is just the nature of the proceedings and the process that sort of presents that this way.

I decided to let us just talk to you alone, because we appreciate the fact that you're an important influence and fact, obviously, in your son's life, and because I have not made a decision on whether or not

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Chris should stay on the jury, because he's been impaneled as a matter of law, or should be excused. So to avoid -- so we can freely discuss kind of what's going on and so you can feel free to discuss kind of what's going on, I thought it might be better if we would just have you alone. I hope that's not objectionable to you.

A Thank you. That's fine.

Q We are, as we are required to do and is appropriate to do, making a record of what is being said and that's what the court reporter here in front of me is doing. And so I just need you to talk up real loud, and I'm sure you will, so that we all can hear.

If I could first just ask you, could you tell us all your name.

A Ryan Phillips.

Q Could you tell us just a little bit about yourself. You're a father, obviously.

A Father of Chris, first-year schoolteacher in IPS school system in Northwest High School and life-long resident of Indianapolis.

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Q I was looking at the transcript of when Chris was talking to us, and he told us you were a teacher at Northwestern and that you teach, is it history or earth science, am I close?

A Both.

Q But basically history and earth science is what you teach there at Northwestern?

A Yes, Northwest.

Q Do you teach a certain grade there?

A Freshmen.

Q Freshmen, okay. Tell us about the fact that you -- you knew when Chris got a summons for jury duty.

A Yes, he showed it to me immediately when he received it.

Q Okay. Was there some discussion with you and Chris about what that meant?

A Well, we were excited about it. We wanted some explanation about it. He's taking a prelaw course at Brebeuf. His instructor at Brebeuf was excited about it also, so we were all looking forward to the proceedings.

Q So after Chris's first day – Wednesday --

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sometime Tuesday evening or Wednesday evening, I guess during the process of the selection of the jury, did Chris share with you kind of what was going on?

A In vague terminology. At that time we called his adviser at Brebeuf and spoke to him about the situation and we talked to a couple of his teachers and they were both excited about it. At that time we talked whether or not it would be possible for him to serve because of his education. They all said it would be fine regardless of the length of time, that they would be willing to work with him after school hours and on Mondays and on weekends to try to keep him up to date with his studies.

Q Mr. Phillips, when you say they, you're talking about the people at Brebeuf?

A His instructors, right, at Brebeuf.

Q His instructors. Does Chris have like a school counselor there at school?

A School counselor agreed with it, also.

Q I think that in discussion, discussing the matter with Chris, and, of course, we were all

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concerned, I mean everybody was concerned and I think I may have shared that with you in chambers, that the fact that Chris was a second semester senior was not lost on any of us. And I think there are probably a whole lot of fathers that are gathered here and were concerned about that.

It is my recollection that he did tell us that he was talking to his school counselor and that apparently initially the counselor and his instructors said it was a good idea.

A They still do. His counselors and instructors still do agree with it.

Q Of course, now what's happened, as you understand, is that at the close or near the end of the day on Wednesday, we ended up with -- there were 20 people that were remaining in the jury box and that we retired to my chambers with the attorneys and we went through a process of striking and selecting a jury.

Among a panel of seventy-five people, Chris was one of six people that were chosen to

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sit on this case and took an oath and what we call impanel a jury or actually swear the jury in to try the case.

I think that Mr. Holland very accurately pointed out to them that from this time on, this will become the Rogers' jury, this will become -- there are some significant issues that are presented to this jury, and obviously there's an intense interest as evidenced by the media interest and apparently -- in the issues on a national scale and perhaps even broader than that.

So we swore him in and we let everybody go is sort of our problem. And here we are, we're faced with four to six weeks of trial and we've got a limited number of people that we've got to make it through with.

So has something changed, then, that caused you to -- I understand you called us yesterday?

A Right.

Q Okay. And apparently something has changed about Chris's position on this jury and being

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able to --

A Right, I received a call from two of the administrators of Brebeuf yesterday afternoon when I got home from teaching. They were advising their concern about how Chris's GPA is 3.9 and change and he's been admitted to I.U., but his chosen field is premed, and they're worried about that the six weeks would damage his GPA to the extent that he couldn't keep up with his honors courses he'll be in at I.U. this fall. So they thought it best that he be removed from the court. And when I spoke with them, I said well, I feel like we've been led astray by the people we've spoken to already in saying it would be fine if you served on the jury and six weeks would be -- he could keep up with his workload. They again expressed their concern that -- their fear that his GPA would suffer because of it, and asked that I did make the call that I made yesterday and ask that he be excused.

Q Your understanding that his grade point average at Brebeuf is 3.9 and change, is that what you

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said?

A Right.

Q On a 4.0 system?

A Right.

Q I've never known anybody like that, so it's just unbelievable.

(Laughter)

Obviously Chris is a young man. How old is Chris?

A He's 18. He'll be 19 in July.

Q Be 19 in July. And his plans are to go to I.U. and he's been admitted to -- I know I.U. has an honors program, he's admitted to their honors program?

A Yes.

Q What's special about the honors program?

A The class load would remain the same. The classes would remain the same as it would for any freshman, but it's just more is expected of them, they have more of a workload in the classes.

Q The one person that's in the honors program I know now graduated I think first in the class

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at North Central High School and is there on a full scholarship. Are there scholarship opportunities available to honor students?

A Yes. He has two scholarships and working on a third.

Q Would those be affected by his final G.P.A.?

A One of them would be.

Q As his father, I guess, we as lawyers just need to know, what's the bottom line here. As Chris's father, Mr. Phillips, what is it you're asking us to do, if anything?

A I'm disappointed to have to ask, because I was excited for him being sat on a jury and was looking forward to his experience that he was going to follow through the court during the proceedings.

I guess I'm -- I have to ask what the administrative people did at Brebeuf, that he be released from his responsibilities on the jury.

Q Okay. I want to offer the option for attorneys to ask some questions. Do you have any objection to that, any problem with that?

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A No, no problem at all.
Q I appreciate that.
THE COURT: Counsel, any questions you want to ask Mr. Phillips?
MR. WARREN HOLLAND: I don't believe so.
THE COURT: Anybody at all?
MR. HARDY: Not I.
MR. WAGNER: No, your Honor.
THE COURT: Okay. Well, I guess that one of the problems that I am sure you're astute enough to know is that presents us with significant problems because there has been an enormous investment of time, resources and energy in this case and through this whole process, although I mean what you're saying is that we've touched all the right bases, Chris was talking to you, seeking counsel from his parents, seeking counsel from --
MR. PHILLIPS: He had gone up through the proper chain of command, been approved all the way up.
THE COURT: Okay. Any further

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questions of Mr. Phillips?

MR. PLESEC: None, your Honor.

THE COURT: Okay. Would you let Steve lead you back to the chambers, please? Thank you very much for coming in. I appreciate it. Who's covering classes today?

MR. PHILLIPS: I don't have a class until 11:45.

THE COURT: Okay, good. I'll be with you. If you and Chris could just wait for me in chambers, I would appreciate it. Okay, thank you.

(Mr. Phillips left the courtroom.)

THE COURT: Any further comments or questions you want to --

MR. WARREN HOLLAND: Your Honor, I was going to say something facetious. We'll take the dad, too.

(Laughter)

THE COURT: Okay. There's a motion on the floor to substitute the dad. All those in favor, signify by saying aye.

Any other comments, facetious or

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otherwise?

Okay. Well, let me go back to where I was, what we were talking about. When Dick was talking about the -- and the proper concern about defectors. I think that the two people --

MR. PLESEC: Your Honor, if I just might, my observation of Chris's dad's comments, it seems to us that there is some real concern on the part of the school administrators about letting this young man serve on the jury, and there likewise is a concern on the part of his dad to allow him to go forward. There is a scholarship in jeopardy.

I would just like to note for the record that we would have no objection if he would be removed.

THE COURT: Any input from the Hollands?

MR. WARREN HOLLAND: Nothing more, your Honor.

THE COURT: I appreciate that, I

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do. I think that it's just one of -- seems to be one of those circumstances that I believe that we have been properly attuned to the problems of an 18-year-old, obviously I expressed my desire in chambers conference and I understand in Mr. Kearney's questioning, we touched the basis about that, and I may have been confused about who asked the questions because I know Mr. Wagner in chambers was talking about the concern of Chris.

But it seems to me the two people we've excused have been people who have done all they could do in seeking those who impact their lives, be it their counselors or whatever. Chris is a young fellow who first -- his dad's comment was he went through the proper chain of command. He went to his parent first, and then they went and all were in consultation with the school administrators, his dad himself -- I didn't quite understand that from Chris's voir dire, but his dad is himself a teacher at Northwest High School in the I.P.S. system.

In any event, I appreciate counsel's

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comments, but I am going to for the record, then, excuse Chris Phillips, let the record so show, from participation on the bases that have been discussed with his father and commented on by counsel.

I've got 9:35.

MR. KEARNEY: Your Honor, I assume that either Steve or Shelly will take his notes and destroy them properly? He won't be permitted to take his notes out of the courtroom.

THE COURT: Yes, we will. Thank you. I appreciate those reminders to detail, like admonitions at the end of the day or whatever. Like your plate, there's a lot on my plate. I appreciate those reminders. I truly do. We need to do that, to pull his notes and destroy them. I don't want to see them, I don't want anybody else to see them, but take them and destroy them.

We don't have one of those little handy-dandy slicer-uppers, do we, shredder? We don't even own a shredder.

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MR. KEARNEY: We don't either, your Honor.

THE COURT: Let the record so show. Let's get going at 9:45. We will do that. We will excuse them. Chris has not been in the jury room, he's been in my chambers, in part because I didn't know the impact this would have, and so I intend to dismiss him and his father from chambers directly to leave. They are not to go to the jury room. I'll have Steve go to the jury room and secure his notebook and his notes and make sure those are destroyed without looking at them by anyone. Then we'll plan to go forth at 9:45. I'll think of something erudite and profound to say at 9:45 about those submissions and about my concern, but I'm going to weigh that because I just don't know -- I'm going to weigh how to handle that. Again, I don't see these as defections, but I'll tell -- maybe I can say something on the positive side, you know, that how important -- that now they become even more important to the process because we have to

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make it through the time. I'll order them not to get sick or have flat tires. I appreciate that.

See you at 9:45.

(The proceedings were recessed at 9:38, to resume at 9:45.)

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(The trial proceedings resumed at 9:50 a.m., the Honorable Kenneth H. Johnson presiding.)

THE COURT: James Miles, the first alternate, he'll move over to Chris's place, huh?

Defendants, you were going to talk to me about addressing you, so I am assuming that defendants continue to be okay unless you tell me otherwise?

MR. WAGNER: Yo.

THE COURT: Yo.

(A discussion was held off the record.)

(Jury enters courtroom.)

THE COURT: The jury may be seated.

Good morning again. I apologize for the lateness of the hour, but I thank you for your promptness. You've been prompt each day. And you don't know, of the checklist of things we need to worry about, not having to worry about the fact that you're here or send the Sheriff's deputies to get you, whoever that may apply to,

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is just great. So thank you for your promptness.

This morning we took up consideration about one of your fellow jurors, Chris Phillips. I am going to report to you that we discussed this morning, Chris was in, and his father as well, and they told us about some changes in the administration at Brebeuf High School's reconsideration about Chris's service on the jury.

We were told that Chris has a 3.9 plus grade point average at Brebeuf, he has been admitted to the honors program at I.U., that he has been already awarded one scholarship, and there's an additional scholarship that was contingent upon his completing this last semester of his senior year, and that that scholarship, if he doesn't maintain his grade point average, is in jeopardy.

It was my opinion that those -- I guess two things about that. One is that those are some significant changes. And secondly, I am always concerned because of the importance of

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losing you. You saw we had 75 people to choose from, and you are the folks that we chose. And we stopped at a certain place on the list, but there's no reason why we had to do that. We had the questionnaires of those other people, and there's a kind of specialness about that, but we have invested enormous amounts of time, energy, and resources in choosing just those people that we believe can be fair to these people. So we chose more than six that are required because we know people get sick and other things kind of happen to them, but not usually in the first two days of trial. Somebody said to me, came by and said, "Well, so far this trial's going without a hitch." "Well, not exactly." There's been a few exciting times on this.

But, in any event, it's my opinion, my second aspect of talking to Chris is that he did go to his parents first when he got his summons for jury duty. When we told him it was going to be four to six weeks in length, he went back to his parents and told them about

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the length of the trial. His parents and Chris went to the school counselors, and they considered it, and their first comment to him was this will not be a problem, and we can -- after school, after hours of the court, on weekends and Mondays, we can make it up.

So armed with that information from the administration of the school, Chris came back and said yes, and you remember the questioning, we talked to him, and the people questioned him about is there any problem, have you talked to your parents, and his answers were appropriately yes to all those questions.

Well, what has changed is the school administration, upon reflection, has decided that there's simply too much at stake, and they became concerned whether they could keep up and whether -- with a 3.9 average, I told him I've never -- I don't even know what that is. I thought Cs were neat, and I was grateful for those that I got.

But because he went through the proper channels as a young man, went to his parents,

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and his parents went to the school administration, and what has changed is the concept of the school administration's ability to keep him at a 3.9 average because his scholarship is in jeopardy, and because of that change, I ruled that Chris could be excused from jury duty.

I guess what that does is highlight how important it is for you to hang on. Do any of you have 3.9 averages anywhere you want to tell us about? I'm always concerned when this happens in the front end of a trial because we can't go on without you, and so one of the questions you heard was about you know the length of the trial, you know the time we're keeping, you know what we're asking of you. We try to be real up-front about that in talking about it with you. We asked about your health, and we did everything but give you physicals, I think, in talking about that, and that's because it's important that you're able to hang with us through the time required, because if you're not, you know what the ultimate response

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for us is, we have to start over. And that would be a terrible, terrible thing to put upon any of these people.

And so I know that it would be nice if all of us were totally in control of all the circumstances of our life, wouldn't that be great? But the fact of the matter is it isn't. But, in any event, I want to explain to you fully what has gone on with Chris and his service and also that that simply highlights how important it is for you to stay healthy, drink your orange juice every morning, I may start sending you home with vitamins just to make sure that you're with us.

Because the Court has excused Juror Summons No. 417, Mr. Chris Phillips, Alternate No. 1 now is Mr. James Miles. Mr. Miles, if you would come down and take Chris's seat, please, in the front row as the regular jury, I now impanel you as a regular juror on this cause, no longer an alternate. That means that Mr. Brabo is Alternate No. 1 now and Mr. Hager is Alternate No. 2.

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I think that's all the housekeeping matters that I need to take care of. True? We're ready to hear from plaintiff's first witness, please.

MR. WARREN HOLLAND: Plaintiffs call Dr. Steve Jay.

(9:58 a.m.)

STEPHEN JAY, M.D.,

having been duly sworn to tell the truth, the whole truth and nothing but the truth relating to said matter, was examined and testified as follows:

DIRECT EXAMINATION,

QUESTIONS BY MR. C. WARREN HOLLAND:

Q Would you state your name, please, sir.

A Yes, I am Stephen Jay.

Q Are you a resident of Indianapolis, sir?

A Yes.

Q What is your occupation or profession?

A I'm a physician.

Q Where are you presently located in your practice, Doctor?

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A I'm at the Indiana University Medical Center.
Q What is your position or title there?
A I am Professor of Medicine and Assistant Dean for Continuing Medical Education for the medical school.
Q Doctor, are you board certified in any medical specialty?
A Yes.
Q Would you tell us in which specialties and when you obtained your certification?
A Internal medicine in 1970 and pulmonary or respiratory medicine in 1972.
Q Would you, for the record, please, describe for us what internal medicine involves and what pulmonary involves.
A Internal medicine involves the evaluation, diagnosis, treatment, management of patients with medical conditions and diseases as opposed to surgery.
Q Pulmonary medicine?
A Respiratory medicine is the medical diagnosis and evaluation of patients with various respiratory diseases.

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Q Would you please give the Court and jury the benefit of your educational background beginning with your undergraduate college.

A Yes. I attended Wabash College here in Indiana, Crawfordsville. Entered Indiana University Medical School in 1963, graduated in 1966. Did my internship at the University of Texas Health Science Center in Dallas at Parkland Hospital; was in the Navy two years, and then came back and did my internal medicine residency at Parkland Hospital, followed by the pulmonary fellowship for two years at the same institution.

Q Then upon completion of your pulmonary fellowship, would you trace for us your course of your professional career?

A Yes, I was on the faculty at the University of Texas Health Science Center in Dallas. Moved to the University of Kentucky in Lexington and was a faculty member in the Department of Medicine, pulmonary division, at that institution. Then subsequently headed up the respiratory division at Wishard Memorial

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Hospital here in Indianapolis, Indiana University School of Medicine, for approximately four years.

Next, assumed the administrative leadership and management of the education and research programs at Methodist Hospital of Indiana where I stayed for approximately 14 years before assuming my present position.

Q Your switch from Methodist Hospital to your present position was rather recent, wasn't it?

A Yes.

Q When did you make that?

A December the 1st, 1994.

Q Would you tell us a little, please, Doctor, about during your tenure at Methodist Hospital, what your various duties consisted of?

A Well, I'm an internist and pulmonologist, so I see patients. I staff the interns and the residents, teach the medical students from Indiana University and the residents, both from Indiana University and Methodist.

In addition, oversee, administratively, the -- all of the graduate education programs

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of approximately 200 residents at Methodist, the allied health training programs, and, in addition, I was administratively in charge of the research and development programs for the institution.

Q In your present affiliation, what are your duties at Indiana University?

A My current duties are the same. I'll be seeing patients as usual, staffing and teaching the medical students, residents in medicine and respiratory medicine. My major responsibilities in the education side will be to direct the universities' continuing education programs.

Q For doctors?

A Correct.

Q Doctor, is it fair to say from what you've told us that a significant part of your time since obtaining your medical degree has been in teaching; is that correct?

A Yes.

Q You have also remained a clinician; is that not correct?

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A Yes.
Q Have you engaged in research, also?
A Yes.
Q Can you describe for us some of the research in which you have been involved just on a general basis?
A Yes. Early in my career I was involved primarily with trying to understand mechanisms that affect the lung in terms of how it defends itself against primarily bacteria. So I did a fair amount of basic research at the University of Texas Health Science Center at Dallas.

Much of my research following that has centered on infectious respiratory diseases. However, I have also been involved in general clinical pulmonary research of various kinds, clinical trials, for example, to study the effects of various drugs for use in diagnosis and management.

Have evaluated areas such as the diagnostic yield of bronchoscopy in evaluation of patients with lung cancer, for example. And more recently, have been involved in what we

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call health services research or research aimed at trying to understand how to improve the way we practice medicine. And associated with that recently, studies involving trying to understand how to improve the application of smoking cessation strategies for patients.

Q Have you published?

A Yes, sir.

Q Could you tell us whether or not you have made any contributions to scientific and medical books.

A Yes, I have.

Q Could you tell us some of those contributions. Have you written chapters in medical texts?

A Yes, I've written many scientific articles that have appeared in peer-review journals, have authored or co-authored three books, and contributed many chapters to textbooks and specialty books in medicine and respiratory medicine.

Q During your career, what has been your occasion for considering the relationship between smoking and lung cancer?

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A If we extend the career back to training in medical school at Indiana University, Dr. Hickam was one of the original members of the advisory committee to the Surgeon General and a very well-known prominent respiratory physiologist and physician back in the late '50s and early '60s. I guess in part because of his involvement in working with other scientists to understand the issues relating to tobacco and disease, at that time we heard a lot about that in medical school.

So I would say that my interest and my knowledge of these issues began in medical school and then, of course, extended through my training in medicine, and then in respiratory medicine, many, if not most of the patients that we would see and evaluate when I did my training, had various diseases caused by tobacco.

And so we were exposed to those kinds of issues during training. And then subsequently, of course, in practicing pulmonary medicine, one sees many, many patients with these sorts

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of problems.

Q Have you also taught with respect to the relationship between cigarette smoking and lung cancer?

A Yes, I have.

Q What part does reviewing x-rays play in your practice?

A Well, x-ray -- x-rays and other imaging studies are one of numerous tests, diagnostic tests, that clinicians, including pulmonologists, use in evaluating patients who have symptoms of respiratory disease.

So evaluation of chest radiographs are just part of sort of the routine evaluation that a pulmonary physician would be using in their daily practice.

Q Doctor, on the basis of your education, training, and experience and research, do you have an opinion which you can state with a reasonable degree of medical certainty whether cigarette smoking causes lung cancer?

A I have an opinion, strong opinion, that it is clearly causally related.

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Q Doctor, does that opinion which you have just expressed reflect the mainstream of medical opinion in the United States and the world?

A Yes, sir. It's an opinion that is taught in all of the 126 medical colleges, medical universities in the United States, and is taught worldwide in medical schools, medical colleges, and is in the mainstream and taught universally in all residency and fellowship programs, and is a major component of the curriculum in teaching continuing medical education courses for physicians who are in practice.

Q In your opinion, is there any respected body of authority to the contrary?

A No, sir.

Q I wonder if you could, Doctor, trace for the Court and jury the development historically of the opinion you have just expressed, which you have expressed is the consensus opinion.

A Well, the history, I suppose, could be considered ancient in some ways because the recognition by clinicians of the addictive

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properties of tobacco --

Q I'm sorry, Doctor, I'm speaking about the lung cancer.

A Oh, of cancer?

Q Yes, sir. I'm sorry.

MR. McELVEEN: Your Honor, I would simply object on the basis it's outside the scope of the 26(B)4 notification we received as to this witness.

MR. WARREN HOLLAND: This is not the case. This, your Honor --

THE COURT: I tell you, I don't have most of the 24(B)4 notifications, or if I do, they're buried under hundreds of pages of pleadings. And so perhaps, you know, it would really be helpful, that is probably always a potential basis for any objection either way we go, but it would be really helpful, if that's the basis of the objection, that -- if you have a copy of it, present it. Response?

MR. WARREN HOLLAND: Yes, your Honor. Dr. Jay was being offered as a wide-scope witness and has been identified, and

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he's giving the foundation for some of his opinions. Even if it wasn't specifically spelled out, it is clearly to trace the historical development of the opinions which he presented to this Court and jury to hear.

THE COURT: Overrule the objection. You may testify, please.

A In the late 1800s, lung cancer was very uncommon, perhaps rare, to the point where, when clinicians and physicians of that era would see a patient, they would routinely report such a patient in the medical literature. So the issue of the uncommonness of lung cancer at that time was well-appreciated.

Clinicians in the early 1900s, beginning in 1910, '20, '30, began to notice and report in the medical literature published widely in respective peer-review journals, a striking increase in lung cancer.

And very early, clinicians began to write about the link in relationship between the use, chronic use, of tobacco and cancer in general,

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laryngeal cancer in 1910, 1905, in that time frame, reports in the Indiana Medical Journal, for example.

But then in the '20s, '30 and '40s, the number of papers raising this linkage between chronic use of tobacco cigarette smoking and lung cancer proliferated very rapidly. So by the 1940s and '50s, a very large body of information had developed regarding this. Drs. Oschner and DeBaky and a number of other very prominent physicians, some of whom are living today, were among some of the early pioneers to describe these relationships years ago.

In the 1950s, considerable information from an epidemiologic standpoint was added to the already large database, if you will. And Wynder, Graham, and Doll published very famous studies of thousands of patients. And clearly showed the relationships here between -- the very strong relationships between chronic cigarette smoking and lung cancer.

That led, in the late 1950s, to the

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Surgeon General's publication in the Journal of the American Medical Association and public statements at that time of his serious concern about the health hazards, risks of chronic use of cigarettes.

In 1961, the presidents of the American Public Health Association, American Heart Association, the Tuberculosis Association nationally sent a letter to the President of the United States strongly urging that the president pull together a commission to look at these issues. That led, as we know, to Luther Terry's -- then Surgeon General Luther Terry's convening of the advisory committee that ultimately published, in 1964, the Surgeon General's Report that we're familiar with.

Q Now, Doctor, has there been any effect from the publications that were done in the '50s and the Surgeon General report in 1964, on the incidence of smoking among physicians?

A The short answer is yes, very dramatic change. In the 1950s and early '60s, over half of American physicians in the United States were

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smokers. And the most recent data I'm familiar with in 1994, physicians, as a group, were the lowest group in terms of the frequency of smoking at approximately 5.4 percent.

So between approximately 1960 and 1994, there's been a rather dramatic decrease in frequency of smoking among physicians.

Q In terms of relative risks, what, if any, increased risk is involved for a smoker as compared to a nonsmoker for lung cancer?

MR. McELVEEN: Judge, let me just interpose, once again, an objection. This man has not been qualified as an epidemiologist, and he may well be able to testify to that. I just don't think a foundation, at this point, has been laid with respect to the doctor's comments on relative risk or, quite frankly, what that term means.

THE COURT: As to the issue of foundation, I think that objection is well taken, at least in the record that I've heard before. I'll sustain the objection, just on -- I think on the basis of foundation.

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MR. WARREN HOLLAND: For the relative risk?

THE COURT: Yes.

Q Doctor, can you describe what the concept of relative risk is from a medical standpoint?

A Well, I guess in my clinical practice, when I see a patient with lung cancer, bronchogenic carcinoma, it is exceedingly rare in my experience that the person is not a chronic cigarette smoker. So, just from a clinical standpoint, I think that my experience is similar to other clinicians who see these patients.

So, as you look at patients coming in the door, so to speak, with lung cancer, it's remarkably uncommon to find such patients not a chronic cigarette smoker.

Relative risk is a term that is used, among others, to describe the likelihood that an individual or a group of individuals exposed to chronic cigarette smoke will develop an indicator disease versus the likelihood that a group of individuals or population of patients

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who are not exposed to chronic cigarette smoking will develop that disease.

Q Is that a concept that you utilize in your teaching and in your research?

A Yes, certainly in teaching about the epidemiology of lung cancer, we routinely present lectures to students and residents regarding concepts of causality, how have we arrived, how did the Surgeon General, in 1964, arrive at the conclusion that cigarette smoking causes cancer, so those basic concepts are included in our lectures, grand rounds, subspecialty conferences, and so on.

Q In terms of relative risk, what, if any, increased risk is involved with a smoker as compared to a nonsmoker in terms of cigarettes and lung cancer?

A Well, the original Surgeon General's report indicated that the risk was approximately ten-fold greater for chronic cigarette smokers than for matched controls non-cigarette smokers.

But if you looked at those patients who

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are chronic cigarette smokers with two to three packs of cigarettes a day, the risk was approximately 20- to 30-fold. And that's -- the brackets there are somewhere between approximately 1,000 percent increase and 2500 percent increase in risk.

So that is a population of individuals of patients or individuals chronically smoking, would have somewhere between a 10- and 30-fold increased likelihood of developing cancer.

There's tremendous variability; for example, if you begin to smoke at age 13, and -- a population of patients, say, begin smoking at 13, you come back at age 50 and compare them in terms of their risk of lung cancer with a population who starts not at 13 but 10 years later, at age 23 and then smokes to 50, the group who starts at age 13, the population of people who begin smoking at age 13 have a 350 percent increase in risk of developing lung cancer.

So when you ask a question like that, I gave you -- I tried to give you a general

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answer, but there are other answers, depending on the nature of the population that you're looking at.

Q Sure. What factors -- I guess age at which you start is one factor in determining the relative risk. What are some other factors that are important?

A Well, the major factor is the -- sort of the total burden of smoke that one puts into their body over a period of years. The length of time, the length of exposure to the smoking is critically important. So the younger you start, the more likely you are to develop lung cancer.

Q Have you had occasion during your medical career to actually observe changes in lungs of smokers?

A Yes, sir.

Q Could you describe what it did show? In other words, can you describe a lung that a smoker -- let me start over.

Can you describe the differences between the lung of the smoker and nonsmoker from your

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observation?

A Yeah.

Q Do you want to draw something or --

A It might be easier to track, if that would be appropriate.

MR. WARREN HOLLAND: May the witness step down, your Honor?

THE COURT: Yes, sir, sure may.

MR. McELVEEN: Again, your Honor, you don't mind if we stand over here and watch?

THE COURT: Yes, sir, no, I don't. You have my permission throughout the course of the trial to --

A I'll try to make this brief. The inhalation of tobacco smoke, acutely and chronically, changes the structure and the function of the lung. Basically it changes the structure, how the lung is put together and how it works.

I'll try to draw for you a -- sort of a simple lung model, and if you'll bear with me, I'm not an artist, but the head is up here, and this is the wind pipe, the trachea, that comes right down here. Then it branches off into a

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right bronchus and a left bronchus. Then you have subdivisions. And same thing over here on the left.

Then from about this point until you get all the way out to -- the heart, by the way, on this model, would be sort of like so (indicating).

From here to here, if we count the trachea as -- put a one on that, and then count the first division two, and so on, all the way out until you get to the alveoli, the little air sacs, you have approximately 22 divisions of airways. So the lung just splits into airways, and they split and split and split, and until you get all the way out into the lung itself where you have these alveolar sacs.

Now, smoke has an acute effect on the lungs, and subacute, and then chronic effects. The acute effects, if you smoke one cigarette, the nerves which come down and supply the lung -- and they basically course along these airways like so -- the nerves are immediately stimulated. If you look at a lung or measure

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its function, you can find that the airway of a normal lung might look like that, but after one cigarette, the airway is narrowed, and so that it's more difficult to move air in and out of the lungs. That happens very acutely. That's the first effect.

The second effect is the lining of the airways consists of sort of a mucus layer, sort of a thin mucus layer. If I could sort of draw a highlight of that. Here is sort of the membrane that holds things together, and then on top of that you've got cells here that are putting mucus out into the airways. These are little cells that puts mucus out. So you have a layer of mucus here like so.

Embedded in this are cells that are ciliated, they've got little cilia on them, little hair-like things. And these beat rhythmically. It's like a wave. And the purpose of this is to move the mucus and any particles that land on the mucus up. So, what happens is it comes up into the trachea, you swallow it, or in people that smoke

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chronically, they'll have excess mucus and they'll cough it out.

After you smoke, acutely after you smoke, you sort of paralyze these cilia and you can demonstrate this with studies in which you aerosolize radionucliis into the lungs and trace and measure how quickly these cilia are moving. You can show that smoke sort of renders them less effective in moving this mucus out. So that's an acute, a second acute effect that you can demonstrate of smoking.

A third effect I've already mentioned, and that is smoke changes the nature, both the volume and the viscosity of the mucus that was put out. So, the mucus in smokers is abnormal. It's not normal. Its increase in volume and constituents of mucus, if you analyze it chemically, are different.

But one of the points is, back to this airway here, in chronic smokers, instead of having an airway that is nice and clean, you have an airway that on cross-section you'll find is narrowed and you'll have secretions in

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these airways. People that smoke, typically you'll get up early in the morning and cough and that mucus and phlegm that they're coughing up is the result of this disease, which is chronic bronchitis.

A fourth effect of smoke on the lung is if we go out into the lung itself and sort of explode an area, magnify a little area of lung, and we get out into the alveolar areas, and this is a view through a microscope, with a hand lens, powerful hand lens you can just see alveoli, but with the microscope you see something that might look like this.

Smoke, if you inhale smoke, which most people do, the smoke will go out through the trachea, through these airways and get all the way out to the far reaches of the lung into these alveolar sacs. And there, because of the chemicals in tobacco smoke, various cells in the lungs in the blood vessels that are taking blood past these alveoli, oxygen goes into the blood, carbon dioxide comes out but there are cells in here and they sense there is something

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foreign in the alveoli, the tobacco smoke, and they will move out into these airways and smoke will cause these cells -- let's just draw a cell like this. I'm magnifying one of these cells down here, let's draw this cell -- smoke will stimulate that cell to release into its environment what we call proteolytic enzymes, collagenase, elastase. The long and short of it, Adolph's meat tenderizer, that stuff you pour and you beat on the meat, basically Adolph's meat tenderizer contains a proteolytic enzyme. Tobacco smoke upsets the balance of the normal host in terms of the release of these proteolytic enzymes versus the release of substances that counteract those enzymes.

What happens is you digest your lung. So, the lung out here, instead of looking like that, might look -- the air sacs would look like so (indicating). And notice there's an absence of air sacs here. This is emphysema. So, you actually auto-digest, if you will, your lung --

MR. McELVEEN: Judge, let me

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interpose an objection here, if I may. This is, of course, a narrative and not a question and answer as is the ordinary case with witnesses, but I haven't objected because the doctor has been talking about things that are at least marginally relevant to this case in the sense that the medical records indicate that Mr. Rogers was diagnosed with chronic bronchitis at one point in time, but he certainly has never been diagnosed with emphysema. And, indeed, and on the basis that emphysema is not a claim in this lawsuit, I would object to the witness's discussion of this. I would move to strike his testimony and I would like to ask your Honor to interpose an instruction that the jury disregard that testimony.

MR. WARREN HOLLAND: Your Honor, as far as the emphysema, we're not contesting that. We're not saying it. The doctor is simply explaining changes that are caused by the cigarettes in the human body and the lung. That's the sole purpose of even mentioning

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emphysema. There is no claim here that it caused emphysema. This is one of the things it does cause which goes to the unreasonably dangerous nature of the product.

THE COURT: I think the jury is sufficiently apprised and will be further apprised of exact claims. I think from the context of the doctor's testimony that, without editorializing, in terms of marginally relevant.

I'll overrule the objection. You may proceed.

MR. WARREN HOLLAND: Thank you.

A In the final, I guess it's fifth point, is the cells then that line these airways, I've shown you some of them here. These cells are under the direct influence of chronic -- of the chronic inhalation of these chemicals in tobacco smoke. And these cells, then, under that influence will undergo changes that one can appreciate by looking at them under a microscope.

Typically these changes will include a

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loss of these cilia, a change in actually the geometry of the cells, a flattening out of the cells. Pathologists use various terms to describe this including cellular atypia.

Then the cells move from that into what pathologists would term premalignant and ultimately malignant changes.

I'm sorry I took so long.

Q That's okay. Let me just ask you this while you're here: On autopsy of a person who has been a smoker, are there any, to the naked eye, changes that you as a clinician can observe?

MR. McELVEEN: Objection, this man is not a pathologist. I doubt he's ever performed an autopsy.

MR. WARREN HOLLAND: I didn't say he did.

Q Doctor, have you seen lungs that have been resected at autopsy?

A Yes.

Q On more than on an occasional basis?

A Examining autopsy material is an integral part of training as a pulmonologist and our teaching

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programs engage residents and faculty in reviewing such autopsy material.

Q Would you explain for the Court and jury, please, what changes are observable under such conditions?

A You can see grossly -- by grossly I mean just the lung, you're looking at a lung of the deceased or at the time of surgery, part of a lung that's been removed, you can see visible evidence of chronic inflammation. There's redness, erythema of the airways of the smokers. You can see visibly the changes in the airways, the bronchitis that Mr. Rogers had, chronic bronchitis, and of course you can see grossly changes of emphysema and if the cancer, the tumor is large enough, you can see the tumor itself. So, many of these changes you can see with your naked eye.

Q Thank you very much, Doctor.

Doctor, are you familiar with the literature discussing the number of cancer deaths per year that are related to cigarette smoking?

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A Yes, sir.

MR. McELVEEN: Your Honor, again I think with respect -- I may be anticipating slightly but probably only by one question, but I suspect this is the same line that we discussed yesterday with Dr. Burns. Number one, I think this would be cumulative testimony. Your Honor has indicated that cumulative testimony would not be permitted.

But secondly, quite frankly, I think this deals again with diseases which are not the subject of this lawsuit. For that reason I would object and object to this line of questioning.

THE COURT: Obviously, it's hard to tell whether it's cumulative or not. It's without knowing, almost like a fact witness, without knowing that the facts from the witness's knowledge are the same. But I think that it isn't -- that it is appropriate, at least under these circumstances. The question is: "Doctor, are you familiar with the literature discussing the number of cancer

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deaths per year related to cigarette smoking?"

Overrule that objection. You may answer that question, please.

A Yes, I am.

Q What does that data show?

MR. McELVEEN: Again, your Honor, unless you want to show a continuing objection on my part, it not only, of course, is this I think inappropriate and cumulative, but it is also hearsay because all he is reporting is what the literature shows, not what is within his experience.

THE COURT: What I am hearing as part of that is the foundation for his testimony, and although that wasn't the word expressed in the objection. I think that's part of what the objection was intended.

On that basis, I'll sustain the objection.

MR. WARREN HOLLAND: I'm sorry, I didn't understand you, Judge.

THE COURT: I think part of the objection is the foundation upon which this witness is stating his answer, whether it's

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based upon printed data, other data or his personal experience, and to the extent that that's -- that portion of the objection I think is one well taken, and I'll sustain it.

Q Doctor, routinely do you rely on information that is available in the medical and scientific literature and is that a practice that is general throughout the medical community?

A Yes, it is.

Q Is that how doctors learn things and teach things?

A Yes. The rate of change in the medical literature is great. So one, to stay current, has to continually review the scientific literature on really a daily basis.

Q Can you tell us some of the sources for the information that you have been asked to give? In other words, what types of resources are you relying on for that information?

A I reviewed, one, the published scientific and medical journals. I take -- have subscriptions to approximately 18 scientific journals and scan those on a regular daily basis.

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Secondly, we rely on textbooks, Pulmonary Medicine, for example, Murray and Nadel, the 1994 edition, is a comprehensive and widely used textbook in respiratory medicine. A variety of other text books, Cecil's Textbook of Medicine, Harrison's Textbook of Medicine.

A third sort of domain of information we use on a daily basis now is in my office I have a computer and can access the National Library of Medicine data bases, and they scan several thousand biomedical journals from around the world, so that if I have a question on a patient, I'll not uncommonly go to the office and pull up with key words literature within a couple of minutes or so from data bases.

So, those are some of the domains of information. Of course, we talk to our own colleagues in the hallway and share information through conferences, teaching conferences on a daily basis.

At I.U. we have approximately 15 pulmonary and respiratory conferences each week that are formal and where we exchange knowledge and

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information.

Q Are the sources on which you're relying for this information in your opinion reliable authorities within the medical field?

A Yes.

Q Okay. I wonder, Doctor, if you could answer the question --

MR. McELVEEN: Judge, again, can we approach the bench?

THE COURT: Yes, you can approach the bench.

(The following bench conference was held outside of the hearing of the jurors.)

MR. McELVEEN: I hate to be the stiff here, Judge, but the objection really, and this is just this 26(b) statement, the fact of the matter is he's not testifying about the other diseases that cigarettes cause. I mean look at the 26(b)4 statement. He's talking about the association between cigarette smoking and cancer. He's testified to that and is presumably going to continue.

The association between Richard Rogers'

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lung cancer and cigarette smoking, that has nothing to do with this line of questioning, and addiction issues which have nothing to do with this line of questioning and that's it. That's what he said he was going to say in his 26 statement.

There's nothing in there at all about other diseases, the number of diseases -- number of deaths that cigarette smoking is supposed to cause.

MR. SHEFFLER: Burns identified the number of deaths yesterday. It's all in the record. You've already ruled, your Honor. The testimony is not --

MR. WARREN HOLLAND: I can't even hear you, I'm sorry.

MR. SHEFFLER: What I was saying is that the judge has already ruled, the testimony was (inaudible) Dr. Burns' testimony --

MR. WARREN HOLLAND: In this state cumulative evidence has never determined to be one witness.

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MR. SHEFFLER: But the issue, your Honor, is twofold. First of all, it is beyond the witness's expert report and during the discovery of the witness's deposition, and, two, it is cumulative and since it is beyond the report --

THE COURT: What's the pending question?

MR. WARREN HOLLAND: I really didn't get it out, but it was the same one I asked before before we established the foundation, which was does he have an opinion as to the number of deaths caused per year with respect -- not cancer deaths, deaths caused per year by cigarette smoking.

THE COURT: Is that the magic 400,000 number?

MR. WARREN HOLLAND: Yes.

THE COURT: Apparently that was on the program last night. Somebody called me last night and said did you see Connie Chung, 400,000 people. Apparently that's a magic number of Connie Chung or somebody.

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So are you anticipating his answer is going to be 400,000?

MR. WARREN HOLLAND: Yes, approximately that, yes.

THE COURT: Where do we go on from there?

MR. WARREN HOLLAND: Nowhere from that. That's the end of that.

THE COURT: Then where are we going? We're going to go into what other area? Will you go into these areas then?

MR. WARREN HOLLAND: We're going back to the lung cancer.

THE COURT: Okay. A brief definition of what I say cumulative evidence is that -- Indiana law, as I understand that, is that there is no precise definition of cumulative. What I meant by that order was I was reserving the right to say that however many times we've done this, this is too many, yes. And whatever that is, what my comment before was that sometimes I don't know if you ask a witness tell us what happened, ask a

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witness what's your opinion, I don't know if it's cumulative sometimes because I have no -- I certainly think that there comes a point at which it is cumulative to the point of being unbalanced and unfair. It's at that point in time where I need to step in.

In this situation at least what's being represented to me is a number that apparently is well known because, again, a third party reported to me that it was on a TV program last night and that number was reported.

In any event, what I hear represented, also, if you're talking about a single question and then we're going to go back into lung cancer and its relationship with Richard Rogers.

MR. WARREN HOLLAND: Yes, sir, that's correct.

THE COURT: I'm going to let the one question in.

(Conclusion of bench conference.)

THE COURT: Let the record show that after a side bar conference with the

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attorneys and the Court having heard the arguments of counsel, the Court is going to overrule the objection and, Doctor, you may answer the question, if you recall what it is.

A Could you restate the question, please?

Q Yes. Could you tell us the number of deaths per year that result as a result of cigarette smoking?

A The figures that I'm familiar with from the recent literature indicate that cigarette smoking accounts for in excess of approximately 400,000 premature deaths in the United States each year.

In terms of lung cancer, approximately one hundred fifty, plus or minus, thousand deaths, premature deaths of cancer are caused by chronic cigarette smoking.

Q Are you acquainted with the data with respect to the percentage of those who die of lung cancer who have been smokers?

A Would you rephrase the question, sir?

Q Sure. Could you tell us what percentage of those who die of lung cancer die as a result of

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smoking?

A Yes, the -- I'm sorry.

MR. McELVEEN: Again, excuse me, Dr. Jay. I apologize, I apologize for popping up to everybody, but I would just interpose the same objection.

THE COURT: Overrule the objection. You may answer, please.

A Yes, approximately 85 to 90 percent of patients who have lung cancer have lung cancer caused by chronic cigarette smoking.

Q What is the leading type -- in other words, where does lung cancer rank with respect to cancers that cause death in the world?

A Well, that's No. 1, having exceeded gastric cancer or cancer of the stomach, fairly recently, I can't tell you the precise date. But lung cancer now is a worldwide phenomenon in terms of the rapid escalation starting in about the late 1800s, early 1900s. So lung cancer now is the most common cancer in the world.

Q What experience have you had, Doctor, in

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helping people to stop smoking?

A I have been involved in counseling my individual private patients, teaching students and residents about how to do that for approximately 25 years.

Q Can you tell us generally what kind of success you've had?

A I have not studied smoking cessation personally or done research in that particular area, and have no data base from which I can draw specific statistics. But my personal experience in practice is similar or comparable to what I read in the medical literature.

The programs that we use, that I use in clinical practice are programs that are various adaptations of the National Cancer Institute four-step program. And I typically will tailor the smoking cessation program for each individual patient because each person is so different. So I don't use one program, a cookie cutter approach, so to speak, but try to assess each individual whose needs are different and then tailor the program. But I

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would use that program.

I typically will use nicotine replacement therapy, ordinarily in the form of the patch, not so much the gum. But with the combination of counseling, pharmacologic therapy with nicotine replacement where it's indicated, and aggressive follow-up by supporting the individual, the patient, calling them at home and supporting them and so on, seeing them frequently.

We see abstinence rates recently when I've looked at this at Methodist that are very comparable to published literature, which at six months would be 20 percent abstinent rates; at a year, in the range of 20 to 30 percent abstinence.

Q Doctor, do you have an opinion which you can state with a reasonable degree of medical certainty on the basis of your education, training and experience as to whether cigarette smoking causes addiction or dependence, or either?

MR. McELVEEN: Judge, I object

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simply on the basis of lack of foundation at this point.

THE COURT: I think under our rules of evidence, there is sufficient foundation for admissibility. Overrule the objection. You may answer, please.

A I believe that the answer is yes.

Q What is that opinion?

A Well, I think it's -- from my perspective, personal practice and review of the literature over 25 or 30 years, that it's clear to me that cigarette smoking is addictive, produces a drug-dependent state.

Q What is it in cigarette smoking that does that?

A The active agent pharmacologically is nicotine.

Q Could you tell us what your definition of dependency or addiction is in this context, please.

A Well, as I see patients coming into the office, I guess I use a pretty straightforward definition. If somebody is using a pharmacologic agent, a drug, in this case nicotine, and they have by history, just asking

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the patient a history of regular, if not compulsive use, and they desire to quit, and most of the patients that I see want to quit and have -- most of them have tried to quit before they see me and they can't quit, to me that's addiction.

Q And that's based on your clinical judgment after interviewing them and considering all the data?

A Yes, sir.

Q I would like you to tell us a little bit about nicotine. What is it?

A Nicotine is a drug. It's a pharmacologic agent that -- it's called an alkaloid. It's been one of the most intensely studied chemicals for a couple hundred years. A lot was known about nicotine well back in the early 1800s. Certainly by 1900 an extensive body of literature about primarily the toxicity of nicotine. Nicotine is an alkaloid, and alkaloids as a general class of drugs produce very significant toxicity. So I'm familiar with that body of literature.

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Q Could you tell us a little bit how it operates with respect to smoking? In other words, what is it about nicotine that -- and how it operates that has an impact on whether a person becomes dependent upon cigarette smoking?

A Well, nicotine, really independent of the way you put nicotine into the human body, has acute effects on the body. So if you inhale it down into your lungs, which I showed here, the lung surface area, all those little alveoli, if you stretch those out, it would be the surface approximately equal to a football field. So that smoke is going down and spreading out into an area which is approximately the size of a football field. So there's tremendous movement, rapid movement of the substances in the smoke into the bloodstream.

Nicotine is no exception. And if you inhale smoke into your lungs, approximately seven seconds later, seven to eight seconds later the nicotine has entered the bloodstream and has gone to the heart and has been pumped up the blood vessels into the brain substance

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itself. So within seconds following inhaling a cigarette, nicotine is moving into the brain cells and on to what are called receptors.

The cells in the brain have these little grabbers that are sitting there and the nicotine molecule is coming along and the receptor or the little grabber attach to the cell, will link with that nicotine molecule. That sets in motion a dramatic alteration in brain chemistry. The metabolism of the brain changes acutely.

Q Then is that what drives the desire for more cigarettes?

MR. McELVEEN: Objection. That's leading.

Q What role does it play, then, in the desire for the next cigarette?

A Well, nicotine, like other substances of addiction, is called a psychoactive agent. It directly affects the brain, and so as you fill up those receptors and then allow some time to pass, the nicotine will move out and the effects on the brain will have started. But

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the lack of nicotine, then, creates a situation where you begin to have symptoms, you begin to manifest changes in your body because of the fact that that nicotine is no longer hooked onto the brain cell.

If you then give another bolus or if you inhale another puff of tobacco, the nicotine moves back, attaches onto the receptors, and those symptoms that the patient develops go away. So it's the pharmacologic action of this drug on the brain itself that is the addictive chain of action.

Q Doctor, are you acquainted with the 1988 Surgeon General's Report?

A Yes, sir.

Q With what subject did it deal?

A The 1988 report dealt with the issue of addiction.

Q What were the major conclusions of that report, do you recall?

A Yes, that chronic cigarette smoking and nicotine in particular is addicting.

Q Did those conclusions, were those new to the

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medical and scientific world at that time?

A No. The Surgeon General's reports are really compendia or compilations of scientific literature. The addicting or dependent-producing properties of nicotine have been known for many, many decades.

Clinicians and clinician scientists were writing about the addicting properties of nicotine in the early 1800s. Clinicians of that day lumped nicotine with opium and alcohol, for example. They used various terms to describe this addiction, and they used habituation, they used addiction, various terms.

But nicotine very, very early on was described by clinicians in the medical literature as in that category of drugs such as opium at that time and alcohol as having addicting properties.

Q When we say clinicians, are we talking about doctors that treat patients and see patients?

A Yes. Of course, in the 1800s and early 1900s, you didn't have full-term -- full-time

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researchers per se. Clinicians would see patients in their office in the morning and teach and do research in the afternoon or vice versa. So there was a steady movement from the patient to the laboratory.

So the answer is yes, these papers that I am referring to were written by clinicians, clinician scientists, keen observers of their patients and the effects of chronic smoking.

Q Now, Doctor, you are familiar with the 1964 Surgeon General's Report, are you not?

A Yes, sir.

Q Could you please explain to the Court and jury, as best you can, whether there are any differences with respect to the subject of addiction between the 1964 and 1988 reports?

A I don't believe so personally. I mentioned my definition of addiction earlier, which is a fairly simple practical one based on seeing patients. The essence of that addiction -- of that definition were contained in the Surgeon General's Report of 1964. There really is no question at all about the fact that they called

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out nicotine as that psychoactive agent in 1964.

But I guess the point I would make is, again, the 1964 Surgeon General's Report was merely a compendium or a compilation of the scientific and medical literature that was decades old at that point. So I guess in my opinion, the addictive properties of tobacco are very old indeed, and have been published in widely circulated peer-review medical journals decades before the Surgeon General's Report.

I guess to conclude the answer, when you move forward, then, in time from 1964 to the 1988 report, what the 1988 report did is it did review a large additional body of scientific literature, which added amazing scientific weight, if you will, to some of these ideas, but in my opinion, it really didn't change the fundamental observations that been made well prior to the 1964 Surgeon General's Report.

Q Have you had occasion, Doctor, to consider the medical records of Richard Rogers?

A Yes, sir.

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Q Have you had occasion to review the bronchoscopy report of August 15, 1986 at Community Hospital?

A Yes.

Q And the pathology report of August 18, 1986?

A Yes, sir.

Q The autopsy protocols?

A Yes.

Q The records of the family physician, Dr. McLaren?

A Yes.

Q The excerpts from records of the Community Hospital admissions, several admissions?

A Yes.

Q The Community Hospital lab reports?

A Yes.

Q The office records of the oncologist, Dr. Demilo?

A Yes, sir.

Q And the x-rays?

A Yes.

Q Have you had occasion to review the videotape deposition of Richard Rogers?

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A Yes, I have.
Q In addition to that, did you have occasion to review lengthy summaries of his discovery deposition?
A Yes.
Q Let me, on the basis of the x-rays, Doctor -- did you review the x-rays?
A Yes, I did.
Q On the basis of the x-rays, did we have a drawing done to reflect -- to illustrate what was shown on the x-rays?
A Yes.

MR. McELVEEN: I'm sorry, your Honor, I did not hear that question. Could I ask that it be reread and the answer?

THE COURT: Can you just repeat it?

MR. WARREN HOLLAND: I can just repeat it, sure.

Q On the basis of your review of the x-rays, did we have a drawing done to attempt to reflect in a drawing fashion what was represented on those x-rays?

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A Yes.
Q In your opinion -- have you seen these drawings? This one here has an overlay. These are marked, so I thought I would refer to them for the record. Exhibit 8, I'd ask you whether or not that accurately reflects the x-ray that was taken in 1984 prior to the diagnosis in 1986?
A Yes, that represents or is a rendering of a normal examination at that time.
Q Okay. And was that what your interpretation of the x-ray taken in 1984 was?
A Correct.
Q Then with the overlay down on that exhibit, what does that represent?
A The abnormal film that was taken on his visit in 1986, was clearly different from the baseline film in I believe 1984.

The difference was the presence of what we would term increase in density, an abnormal density in the right lung and the structures in the region of the hilum, perihilum, peritracheal area of the right lung.

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MR. SHEFFLER: Your Honor, may we approach the bench on this?

THE COURT: Sure.

(The following bench conference was held outside of the hearing of the jurors.)

MR. SHEFFLER: Your Honor, yesterday I made an objection when certain things that were shown to the jury were offered as exhibits. At the point in time that they were being published to the jury, I thought they were demonstrative aides, so I didn't raise the objection. I'm not exactly sure whether these are demonstrative aides or whether these are new to be offered as exhibits. I would like the plaintiff to make that clear so I can make a timely objection at this point. I have no objection if he's using this as a demonstrative aid, but if it is going to be used -- tried to be offered as evidence later, then I certainly would object.

THE COURT: It seems to me they're illustrations created from an x-ray to show more graphically, so I assume it'd be for

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demonstrative purposes.

MR. WARREN HOLLAND: They are. They're for demonstrative purposes. They're not being introduced --

MR. SHEFFLER: The reason why I had to make the objection, your Honor, is yesterday I thought the same thing was happening with those charts.

THE COURT: Of course. And the representations are demonstrative, right?

MR. WARREN HOLLAND: They are, sure.

(Conclusion of bench conference.)

Q Doctor, to assist you in -- well, let me go through one more here before we do that. It's been marked for identification as Exhibit 9. Can you tell us what that was drawn from and what it illustrates?

A Mr. Rogers had -- the initial radiographic procedure was a PA and lateral chest radiograph and shortly thereafter when the abnormality was noted on that film by the clinician and the radiologist, another imaging procedure was

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taken to attempt to better define the location and extent of the density that was seen on the original PA and lateral chest film. That study was a computerized axial tomography or so-called CAT scan or CT scan.

That allows one to take a slice, if you will, through the body at a particular area, and this shows a section cut through the density that was seen on the plain PA and lateral chest x-ray.

Q Do you think it would assist you in helping the jury understand what was shown to step down here and discuss these?

A I would be happy to.

THE COURT: Yes, sir.

Q I don't think they'll fit on that, but maybe I can just hold these up for you while you do that.

A I drew earlier on the chart behind you the trachea and the right and left bronchus, and here is that structure that I drew on that chart over there.

What you can't see is the division to the

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right and division to the left. They're behind these great vessels, the aorta and the vena cava here.

You see the lung, which I tried to represent on that chart, the right lung is here (indicating). The left lung is here (indicating). And this is the heart right here (indicating). And shown here is the area of increased density that was seen on the PA and lateral chest x-ray.

Q If I push this back, it would probably give you more --

A This would be what a normal lung would look like.

Q All right, sir. And then this one here.

A This is a reproduction of that previous chart, and you see this white line. Just envision that you're standing up at the head or at the feet and now you're looking sort of through the body. It's as if you take a slice right through and you're looking actually at a cross-section of the body, and the artist has attempted to show that, depict that here.

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What you see is the spine here, the spinal cord. These are muscles and so on. And then you can see the great vessels, the aorta, but I would draw your attention to this structure here (indicating). This is a bronchus, which if you envision the trachea has come down like so, the structure right here, and it has split into those -- into that Y I showed you over there, so one is going this way and one is going this way.

If you take a cross-section through in that, you kind of get this sort of a rendering on the left side which is normal.

Then on the right side you see this abnormality here shown in yellow which is the density, the abnormal density that was seen up here. You can see that it circles or surrounds the airway on that side and partially encases one of the blood vessels, and is involved in the lung ferruginea or the lung substance itself.

Q Thank you, sir. Doctor, on the basis of your education, training, experience and review of

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the materials that have been described, do you have an opinion which you can state with a reasonable degree of medical certainty whether Richard Rogers developed lung cancer?

A Yes, he had lung cancer.

Q Can you tell us your opinion with respect to what type of lung cancer?

A I reviewed the biopsies taken at the time of bronchoscopy, and in addition, he had a lymph node that was enlarged in this sort of area of your neck up here, the supraclavicular area, and a biopsy of that was taken. Those were reviewed by the pathologist. And those were called small cell carcinoma, small cell anaplastic carcinoma, which is one of the types of lung cancers that we commonly see in patients who smoke chronically.

Q What percentage of lung cancer is of that type, small cell carcinoma?

A It varies from series to series, but there are three sort of major types and then a fourth type. Squamous cell carcinoma, small cell carcinoma and adenocarcinoma, and then large

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cell.

The first three I mentioned represent approximately 25 percent of all lung cancers, so each of those, and then you have a smaller percentage of patients who have what we call large cell undifferentiated carcinoma. So, it is a common -- I'm sorry. So it's one of the common types of lung cancer that we see commonly in chronic cigarette smokers.

Q Thank you. What's meant by primary site of a tumor?

A Primary as opposed to a metastatic site. Primary cancer when it occurs in the body is referred to by clinicians and scientists as the original site in the body where the normal cells change into malignant cells.

Metastatic cancer refers to cancer which has started at that primary site, but has invaded the local tissues, the tumor cells gain entrance into the blood supply, and then are pumped around through the body. If a tumor cell lands in the liver and starts to multiply, you would have a liver metastasis, for example.

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So that's the difference between primary cancer and metastatic cancer.

Q So if -- for example, if the primary site of a cancer was in the lung and it were found elsewhere in the body, that would be the result of a metastasis then?

A Yes.

MR. McELVEEN: Objection, leading.

THE COURT: Overruled. You may answer the question.

A Well, most lung cancers are primary lung cancers. We call them bronchogenic carcinoma, and included in that category are the cell types I mentioned. And virtually always those are primary, that is they -- the tumor starts in the lung cancers.

Q Do you have an opinion if that was the case with Richard Rogers?

A I believe it was. In reviewing his clinical history, the physical examination, the chest x-rays and laboratory findings, the images and so on, his course and the changes that we

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observed are totally consistent with primary bronchogenic carcinoma of the small cell type.

Q Do you have an opinion as to the cause of death of Mr. Rogers?

A Well, he died as a result of chronic cigarette smoking, lung cancer and the complications attendant to that.

Q Doctor, let me ask you, are you familiar with the treatment Mr. Rogers received for his lung cancer?

A Yes, sir.

Q Would you describe what it was for us, please?

A Mr. Rogers was given a course of chemotherapy, Adriamycin, Cytoxan, Vincristine, which in 1987 was a typical chemotherapeutic regimen. Patients with small cell undifferentiated cancer, when they present, they have systemic disease.

We know from many studies that when Mr. Rogers came to us, he had tumor cells elsewhere, and for that reason it's very uncommon for surgery to be used in treating this disease because it's not localized, as

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some tumors are, that can be extracted by surgery. Instead, it's into the lymph nodes and has entered into the bloodstream, and so for that reason, the treatment is chemotherapeutic drugs, which when administered move into the circulation and spread throughout the body, and the intent there is to try to kill these tumor cells wherever they might be in the lung or elsewhere in the body.

So he was treated that way. He also received whole brain radiation. It's known that very commonly patients with this tumor have early metastases to the brain itself. And it's been found in studies that if one treats with whole brain radiation, one can delay the onset of that.

In addition, he received later in his course two commonly used and well-known chemotherapeutic agents, Cisplatin and a drug called VP16.

Towards the end of his life he presented with severe pain in his back and metastasis of the tumor into an area of the nervous system.

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That produced changes in the nerves and a pain syndrome. And as a result of that, an effort was made to try to ameliorate his symptoms with radiation. And, in addition, he received Methotrexate to try to shrink those metastatic tumor cells and relieve his pain.

His treatment at that point was clearly aimed at palliation, trying to relieve the pain and the symptoms. It was not at all the intent of treatment or the expectation of treatment to cure the disease.

Q What is the expectation or life expectancy for one who presents with small cell lung cancer as Mr. Rogers did?

A Prognosis is very poor. Lung cancer in general has a five-year survival even with treatment of only approximately 10 to 12 percent, so if you take all people with bronchogenic carcinoma, treat them with the best treatment we have today, only approximately one out of ten patient will be alive five years later.

Now, small cell undifferentiated carcinoma unfortunately has a more aggressive tumor

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biology profile. The doubling time of that tumor is much more rapid than the other cell types. And so it's aggressive and the survival is less. So one would typically expect at that time to have a patient who would survive perhaps a year or two with treatment.

Without treatment, survival would be measured in weeks.

Q On the autopsy, was there still any cancer present in the lungs?

A No, at autopsy there was no tumor found.

Q Would that be surprising to you, given the treatment here?

A No. He had a fairly expected course following chemotherapy. The tumor shrank very rapidly on chest radiograph, that density that you saw in those figures virtually disappeared on those films. And he had several months of I think good quality life before he developed the metastatic focus that caused the cauda equina syndrome.

He had both chemotherapy and radiation to the chest, and it's not uncommon in these

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patients to not find residual tumor at the primary site at autopsy, so I would not be surprised at that finding.

Q Doctor, on the basis of your education, training and experience and review of the materials which have been identified, do you have an opinion concerning whether or not Richard Rogers was addicted to cigarettes?

A I believe he was addicted to cigarettes.

Q Do you have an opinion on the basis of your review of the testimony that you have read of the time when it was likely that he was addicted?

MR. McELVEEN: Judge, I'm going to object to this line of questions, particularly to that question, on the basis that Dr. Jay never saw Richard Rogers as a patient, he never saw him in a smoking cessation program. All he's done is reviewed records. He doesn't know what Mr. Rogers' situation was and I don't believe he's in a position to give an opinion within a reasonable degree of medical certainty as a medical

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practitioner.

THE COURT: I think what's missing, and several times when objections have been inserted, the foundation for this particular opinion, it's my opinion that it just isn't in the record the foundation to assert and to state this opinion. I think the question is when was it likely that Mr. Rogers was addicted and I --

MR. WARREN HOLLAND: Let me go further, your Honor.

Q On the basis of your review -- strike that.

You had an opportunity to review his video deposition, did you not?

A Yes, sir.

Q That lasted approximately how long?

A I think it was about 50 minutes, 45 minutes or so.

Q Was that helpful to you in gathering the kind of information you would from a patient if he came into your office?

A Yes, it was very helpful.

Q Then you had an opportunity to review the

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extensive lengthy summaries of the discovery deposition, did you not?

A Yes.

MR. McELVEEN: I object, Judge. This is leading.

THE COURT: The question is you had an opportunity to review summaries. It is leading, but it's not a matter that's critical. I mean it's just a matter I think in terms of saving time about reviewing matters.

I am going to overrule the objection, but will ask counsel to avoid leading questions, if you would, please.

MR. WARREN HOLLAND: Sure.

Q Did you say you have?

A I said yes.

Q What is your understanding on the basis of that review with respect to when Richard Rogers began smoking?

MR. KEARNEY: Objection, your Honor.

MR. McELVEEN: I'm sorry, your Honor, he asked a different question than I

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thought he was going to ask. I'm sorry.

THE COURT: You may answer the question. There's no objection.

A He began, as I recollect, smoking at an early age, before he was ten, five, six, seven, eight or so, but small amounts, but by the time he was a teenager, he was a regular smoker.

My interpretation of the records and certainly looking at the videotape, he at that time was a pack-a-day smoker, for example, at the first year of high school, freshman year in high school. So I would suspect that he was clearly addicted at some point --

MR. McELVEEN: Objection, Judge.

MR. KEARNEY: Objection.

MR. McELVEEN: I don't think that provides the basis for the doctor's response. I think that that still lacks foundation.

THE COURT: I agree. Sustain the objection, I'll strike the portion that relates to addiction, ask the jury to disregard that portion of the testimony. Next question, please.

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MR. WARREN HOLLAND: Your Honor, if we're going to have to do the lengthy hypothetical, I don't know what the Court's pleasure is on break, but we're just trying to save time.

THE COURT: I think it's time. Let's take a morning break at this point. It's 11:24. Let's take a 15-minute break. The jury may rise, they may retire, and we'll be in recess for 15 minutes.

(A recess was taken from 11:24 a.m. until 12:04 p.m.)

THE COURT: Bring the jury in, please.

(The jury was escorted into the courtroom.)

THE COURT: The jury may be seated.

I think at the recess we were in the direct examination by plaintiff's counsel.

Mr. Holland, you may proceed.

MR. WARREN HOLLAND: Thank you, your Honor.

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DIRECT EXAMINATION (Continuing),

QUESTIONS BY MR. C. WARREN HOLLAND:

Q Doctor, you have testified that in your opinion Richard Rogers was addicted and I had asked you to tell us, if you can, when he became addicted. That's just where we are to bring you up to date.

What information would you want to know to give that opinion? In other words, what would you want to know about him in order to render that opinion as to when he became addicted?

A No. 1, was he taking a drug, nicotine? No. 2, if he smoked, was he inhaling? And No. 3, the frequency of use of the product and how he was reacting, how his body was reacting to that. Those would be the sort of categories of issues I would be interested in knowing.

Q Did you believe that from your review of the materials that we presented to you, that you had that information available to you?

A Yes.

Q Let me go ahead, then, and just so that we -- I am going to ask you to assume with respect to

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the amount he was smoking and the age at which he began. He began smoking at about the age of six; and that up until he was about nine years old, his smoking was sporadic; that he began inhaling when he was about 12 years old in the sixth grade; and that at that time he was smoking close to a pack a day; and that during high school, beginning at age 14 and continuing through when he was 18, he was smoking at least a pack a day; and that from the time he graduated from high school and for the next eight years he smoked two packs a day; and from that from that time until approximately 1961, he began smoking three packs a day, which he continued for the next 25 years.

Do you recall that he testified in his deposition that he tried and could not quit.

A (Witness nods head affirmatively.)

Q Do you have on the basis of the information that has been afforded you, do you have an opinion as to approximately when, in your opinion, Richard Rogers became addicted to cigarettes?

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A Yes, I think it's probably sometime in his teens, high school, in that time frame.

Q Doctor, I wonder if you could tell the Court and jury, please, your opinion with respect to what the effect is on a smoker's ability to choose when he has become addicted.

A Well, the effects of nicotine on the brain are such that one once dependent on the drug, on the active agent in tobacco smoke, in this case nicotine, one upon cessation of smoking will have a variety of symptoms and signs, as we call them in clinical medicine, that relate to the withdrawal of the nicotine or the movement of nicotine from those brain receptors I mentioned earlier. The abolition or the abolishment of those symptoms is achieved by the next cigarette that one smokes.

So, I mentioned that he was likely addicted in his teens because, again from the deposition, at that point he was a regular smoker, he was smoking regularly, and was smoking in the range of a pack a day by his -- as I recollect his deposition.

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He had described symptoms early when he began to smoke that indicated to me that the nicotine was entering his system, I think dizziness and so on, he had symptoms that we commonly see, particularly in young kids when they first start smoking. And the body not having been exposed to nicotine reacts in a very predictable sort of way to the nicotine and one develops a variety of symptoms from the nicotine, one of which I mentioned he had.

Secondly, by his history, he started out with just a few sort of butts and parts of cigarettes when he initially smoked, but then over the years and extending up through grade school, high school, and then beyond that, he gradually increased the number of cigarettes that he smoked. And that is a well-recognized phenomenon that's been known since the turn of the century that relates to the fact that the body adjusts to nicotine to achieve the abolition of those symptoms that I described. One has to increase the dose of nicotine to accomplish that. And some people use a variety

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of terms to describe that, tolerance is one such term.

So, those specific facts, as I obtained them from the written record and the deposition, lead me to the feeling that he was taking a psychoactive agent in the form of nicotine by cigarette smoke, that that substance was entering his body as manifest by symptoms, that he was actively seeking the agent on a regular sort of basis to the point where he was smoking at least 20 cigarettes a day in high school.

The dose or the number of cigarettes and, therefore, if you will, the amount of nicotine that he was putting into his body escalated over time. So, to achieve the sensation he had to continually increase that, to the point where he was smoking, I think, as I remember, about three packs of cigarettes a day.

So, the combination of those facts, I guess, from the record and the deposition, are very consistent to me from my clinical experience in talking to people who are chronic

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cigarette smokers and addicted is very consistent with an individual who was addicted in high school, the time frame that I mentioned.

Q What effect, in your opinion, does the fact that someone is addicted to cigarette smoking or dependent upon cigarette smoking have on their ability and freedom to make an informed choice to smoke or not to smoke?

A Well, when one is addicted to a psychoactive agent, in a sense you no longer have the freedom to choose. You are being driven by a very powerful agent, in this case nicotine, an alkaloid that affects the brain. And if you want to quit, you may not be able to quit because of the effects of the absence of nicotine in the brain. That is you have to replace that to remove the symptoms that occur when the nicotine fades away.

So, in a sense, any addiction with heroin or cocaine or alcohol or what have you, tobacco, chronic cigarette smoking with the nicotine, you really do not have the choice

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once in that state to either continue or to forego it because your body is telling you to take the next cigarette to achieve that dose of nicotine that affects the brain that relieves those symptoms.

Q Thank you very much.

(Exhibit(s) 7 was marked for identification.)

Q I'm going to hand you what's been marked as Exhibit 7 and ask you if you can identify that for us, please.

A Yes, that's my curriculum vitae as of May of '94.

Q Does that accurately set forth your curriculum vitae?

A Yes.

MR. WARREN HOLLAND: Your Honor, at this time we would offer into evidence Exhibit 7, which is the CV of Dr. Jay.

MR. McELVEEN: Judge, we simply renew the objection made yesterday with respect to Dr. Burns. That is, the doctor has already testified to it. This is hearsay in writing

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what he's orally testified to. That's our objection.

THE COURT: Well, it's hardly hearsay. He says it's his. I'm not sure how that's --

MR. McELVEEN: That's still a document. That's hearsay. I could have written something but it would still be hearsay. His oral testimony is the testimony. He's already testified.

THE COURT: I overrule the objection. I find no basis in the objection. I allow the admission of Exhibit 7.

MR. WARREN HOLLAND: Your Honor, that concludes direct examination.

THE COURT: You may distribute Exhibit 7 to the jury.

Warren, why don't you go ahead and distribute those to the jurors. Probably some extra copies there. I have a file copy and distribute those to the jurors, if you will, please. This is a witness page.

MR. McELVEEN: Would the Court

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like to take a break for lunch at this point in time, because we will be setting up a podium, your Honor, and setting up one of the stands and so forth. Might be an appropriate time before cross begins.

THE COURT: Fine, thank you. We'll do that. We're having trouble communicating with the arrangements we made for lunch is the reason I'm looking like that. We haven't been able to get through to them on the telephone and can't figure out why that won't work. Steve was on his way. My comment before was to hoof it to the restaurant. If they can't get to the phone, walk there.

It's about 12:17. Plaintiff's counsel have indicated that concludes the direct examination of the witness. This is a good time to take a break.

With that the jury may rise. Remember your admonition not to discuss the case with anyone, and we'll see you at 1:15.

(At 12:18 p.m., the trial recessed to reconvene at 1:15 p.m.)

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